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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No. 471

A. B. GOCHENOUR, MEYER ABRAMS, HARRY J. MYERSON and FANNIE B. STERN, EXECUTRIX OF THE ESTATE OF JOSEPH L. STERN, DECEASED,
Petitioners,

vs.

THE CLEVELAND TERMINALS BUILDING COMPANY, FREDERICK L. LECKIE, JOSEPH G. FOGG and I. WALTER SHARP,
Respondents.

On Petition for Writ of Certiorari.

PETITIONERS' REPLY.

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STATEMENT.

The "debtor" and the "appointees of the Court" have unnecessarily burdened this Court with separate Briefs. The debtor's Brief is confined to the discussion of the denial of compensation to Petitioners, while the Brief of the other Respondents (who prepared the debtor's Brief) discusses both phases, the denial of compensation to Peti-

tioners, and allowances to them, repeating the argument in debtor's Brief which they prepared in its name. For these reasons, it will not be necessary to reply to the debtor's Brief and this Reply is only to the Brief of Respondents, Leckie, Fogg and Sharp.

Instead of discussing Petitioners' Brief chronologically, answering Points I and II (pp. 26-40) concerning the $65,000.00 allowance and discussing thereafter Points III and IV (pp. 40-57) concerning the denial of any allowance to Petitioners, they, for obvious reasons, confused the issues, reversed the order, discussing in the Brief under Points I, II and III (pp. 7-13) the denial of compensation to the Petitioners, and under Point IV (pp. 14-25) the justification of the allowance made to them, and under Point V, they attempt to answer the points argued in Petitioners' Brief. A logical argument was avoided for obvious reasons. We will discuss the points raised in their Brief in the order as they appear in Petitioners' Brief.

I.

The Writ Should Be Granted to Review the Allowance Made to the Respondents.

At the hearing before the Special Master as well as before the District Court and in the Court of Appeals, Respondents took the positive position that the filing of the suit for which they were allowed compensation based on the *ex parte* order of May 1, 1941, *was not the result of the decision* of the Court of Appeals *obtained by these Petitioners* which directed the District Court to appoint examiners to investigate the charges against Ball and to either instruct the Debtor to commence the suit or to permit Petitioners to sue (118 F. (2d) 89), but on the *contrary,* they *persistently* stated that the action was com-

menced because of the subsequent decision concerning the claims of Midamerica (119 F. (2d) 231). They now *admit* and *confess* that it was the first decision that prompted them to begin the action and they say (p. 27), that it was their duty as "supervisors" of the Debtor to commence the action and that *they relied* on the decision in *Gochenour* v. *Cleveland Terminals Building Co.*, 118 F. 289, and *they cite* (p. 28) from the decision the following:

> "A debtor continued in possession under the present act has authority and it is its *imperative duty* with all diligence to collect the assets of the estate." (Emphasis theirs).

and after quoting from that case, they say:

> "Thus, naturally and properly so functioning, they studied the possibilities of affirmative action on the facts and theories developed in the opposition to the Midamerica claims. They would have been remiss in their duties if they had done otherwise."

The foregoing position was not taken by them when the petition to join the Debtor as a party to the Howe suit was presented to the District Court, as clearly appears from their answer, neither did they take that position before the Master when they presented their petition for instructions, nor before the Master on the hearing concerning the fees, but on the contrary they contended throughout the proceeding that the first decision did not influence them and had no bearing whatsoever in connection with their starting the action.

They now attempt (pp. 14 to 25) under Point IV to justify their allowances: (1) because the allowance was "discretionary"; (2) that a Court may consider facts within its "own knowledge"; and (3) that the allowances were not "unreasonable". The first two propositions are not in anywise applicable because the allowances made were

not due to the exercise of discretion; but to the application of the *erroneous legal principle* that appointees of a Court who are *not* appointed on a *contingent* basis are entitled to compensation on a *percentage* basis, regardless of the time devoted, the skill employed, the difficulty of the problem, and the fact that the recovery was the result of a compromise and not of a trial. No discretion was exercised, because the District Court *assumed* that its appointees had developed *all* the facts and *all* the theories. Its conclusion is different from the conclusion of the Court of Appeals that the facts and the theories were supplied and developed by Petitioners and the applicable law was settled in the decisions prior to the commencement of the action. That the District Judge did not and could not have had personal knowledge of the services of its appointees was fully discussed in Petitioners' Brief (pp. 43, 47), and no further reply is necessary.

The third point, that the $65,000.00 allowance was "reasonable", is completely *without merit.* The authorities which they cite apply to attorneys who were employed on a *contingent* basis and who have produced the fund as the result of a *trial and where the attorneys discovered the cause of action.* In the instant case, the Respondents were the appointees of the Court and were *not* employed on a contingent basis. All of the facts and all of the theories and applicable principles of law were settled *before* they commenced the action and they employed a local attorney who was allowed separate compensation.

The only cases which they cite where an attorney for a bankrupt trustee was allowed a $15,000.00 fee is *Page* v. *Rogers,* 149 F. 194. In that case, the fee was upheld because "about one-half" was to be paid by "creditors" and the Court said that unless it "should hold that this

allowance was excessive to the extent of more than one-half, it would not benefit appellants".

The lengthy quotation (p. 21) from the *Osofsky* case is of no comfort to them because this case enumerates *six* elements which are *essential* for the due consideration of compensation to attorneys. These elements are completely lacking here. With the exception of the "conferences", "researches" and the "discussions" with *themselves* which are set forth in their schedule, not a word is to be found in this record concerning these elements which are essential to establish the "reasonableness" of fees.

We pointed out in the Petition that the *essential basic facts* for the allowance *are lacking* in the Master's Report as well as in the Opinion of the District Court. The question whether a Court may sustain a Master's Report which lacks basic findings is a question which deserves a review by this Court.

The illustrations of the cases where funds were recovered by attorneys employed on a *contingent basis* were shown above to be inapplicable. On the other hand, there are many cases where funds were brought in as the result of actual trial and skill employed, and no such liberal allowances were made. The case of *Fisk & Co.*, 209 F. 982, involved a plenary suit where attorneys for a trustee collected $325,000.00 and they asked an allowance of $40,000.00. The Court found that the "questions of fact were complicated", investigation and the preparation of the evidence was warranted, the "questions of law" were "difficult", and the defense was "ably and shrewdly contested", there was a trial and an appeal to the Circuit Court of Appeals and to the Supreme Court of the United States. The Court recognized the "highest

appreciation the value of the services" and it only allowed $32,500.00. In the instant case all the facts were disclosed in the Howe suit and in the Gochenour suit, prior to the appointment of Special Counsel. The factual matters were all established on the objections to the claims of Morgan and Midamerica. The legal questions were solved in the appeal of these appellants in 118 F. (2d) 89 and in the appeal of the Midamerica claims (119 Fed. (2d) 231). *The case was not tried but was settled on the pleadings.* A local attorney was allowed $3,000.00 for his services. There was no finding as to any complications, difficulties or investigations, and yet an allowance was made of $65,000.00!

In the case of *In the Matter of Cheney,* 300 Fed. 465, attorneys were appointed to institute suit in the name of the trustee on a *contingent basis.* They won, and brought into the estate the sum of $800,000.00. The Referee allowed them $62,500.00 for their services. The Judge held that the allowance "was plainly excessive". He said "the extraordinary rewards for brilliantly successful results", which are often willingly paid by individual clients, cannot be expected as allowances for estates in bankruptcy. *He only allowed* $21,500.00.

In re Allied Owners Corporation, 79 F. (2d) 187, affirmed 297 U. S. 464, the attorneys for the trustees representing an estate of $18,000,000.00 who performed services covering 4,500 hours involving many complicated questions of law and fact and litigation, asked for the allowance of $75,000.00 and were only allowed $50,000.00.

In *Mecartney* v. *Guardian Trust Company,* 280 Fed. 64, attorneys brought into the estate as a result of litigation and actual trial, $700,000.00. They were employed on a contingent basis and were allowed $37,500.00.

We can find no case where "appointees" of a court whose fees were *not contingent* were allowed 12% of the fund recovered. The *legal foundation for the allowance was* "clearly erroneous" and the order should be reversed.

II.

The Facts Found By the Master and By the Trial Court Are Not Conclusive Because They Are Based on Inferences Drawn From Undisputed Facts.

The contention under Point I (p. 7) that the facts found by the trial Court are conclusive unless "clearly erroneous" is *inapplicable* for the reason that the findings of the Master and of the Court are *not* based on controversial evidence but *on inferences and deductions* from the undisputed facts and the rule is not applicable to such cases. Besides, the rule is inapplicable to the payment of fees to attorneys. (*Columbian National Life Ins. Co.* v. *Kayes,* 138 F. (2d) 382, 385.)

In *Slavin* v. *Port Service Corp.,* 138 F. (2) 386, the third circuit did not hesitate to reverse a master and judge where there was no foundation for the findings and the rule was no obstacle.

The debtor has attached to his Brief as Appendix the Opinion of the District Court. This was unnecessarily done because the Opinion is printed in the Record (pp. 94-99). This was reprinted because of the desire of the appointees of the court that this Court should give special attention to the Opinion of the District Judge because (p. 2) "it is not long". After reading the Opinion of the District Court, we ask this Court to read the comment on his Opinion in the Petition (pp. 43-47) and the Opinion of the Court of Appeals in 118 F. (2d) 89.

III.

The Answer to Petitioners' Argument Is Confusing and Evasive.

Instead of answering the Petitioners' Argument in the manner as presented, they chose to answer the Petition at the tail end of their Argument (pp. 25-44), and their Argument is confusing and evasive.

The statement (p. 25) that the Circuit Court of Appeals agreed with the findings of the District Court that Petitioners contributed nothing is refuted by the Opinion of the Court of Appeals.

On the one hand they say (p. 28) that Mr. Sharp was appointed Special Counsel for the debtor in connection with the Midamerica claims and he devoted his time to the cause of action against Ball, and, on the other hand, they say that the Order appointing Leckie and Fogg as "supervisors" included an investigation as to causes of action available to the subsidiary debtor. They *concede* (p. 28) that Sharp included in his "fee bill" services rendered prior to May 1, 1941, concerning the recovery of this fund but say that *they*, the "supervisors", also included in their fee bill services for the corresponding period which the Master postponed to a later date when he allowed the compensation to Sharp. Query: If Sharp was specially engaged to perform such service and was paid for such service during that period, *why was it necessary to have Messrs. Leckie and Fogg duplicate the service and why were they entitled to compensation for the same period?* It was at least their duty to testify and explain why this duplication was necessary.

In answer to the point that the position of the debtor was adverse to that of the creditors, they say (p. 31)

"that the debtor has been in possession, technically" as they, "Messrs. Leckie and Fogg" acted as the "supervisors". The appointment of supervisors did not remove the adverse interest of the corporate officers and while Leckie and Fogg acted as supervisors of the Cleveland Terminal Buliding Co., they acted, at the same time, as Trustees for the Parent, the Van Sweringen Corp., and *such interests were adverse.*

The contention (p. 33) that the Respondents did not avail themselves of the facts and theories developed by the Petitioners and set forth in the Gochenour and Howe suits because these two actions were "grounded" on the theory of "actual fraud", being the same theory "that the same counsel asserted in their unsuccessful effort" to defeat the claim of Morgan, is *false* for the reason that while Petitioners were unsuccessful to defeat the *entire* claim, they *did defeat the claim to the extent of* $5,000,000.00 (117 F. (2d) 259) which neither the debtor, nor the subsidiary debtor nor the appointees of the Court contested. That the theory in these two suits was the basis for the theory of the suit later commenced by the Respondents was fully discussed in the petition (pp. 36-38) and no further reply is necessary.

The justification for the admission in evidence of the newspaper clippings on the ground that they were not offered as evidence of the truth of the statements contained therein, but for the purpose of showing that Petitioners did not furnish this knowledge, is without any reference to the record to show that these documents were offered for any particular purpose. A reference to the Master's Report and the Opinion of the Judge will refute the contention.

In answer to the point that if these newspaper clippings were available to the Master and to the Court as to apprise them of the existence of the cause of action they would have taken action to prevent the distribution of the funds to the Ohio residents by Midamerica, Respondents say (p. 34) that distribution was made in the Spring of 1937. *This case was pending in Court since October* 13, 1936. If the Master and the Court had knowledge from the newspaper clippings in 1936 of the existence of the cause of action, *they would not have permitted the distribution of the funds in the Spring of* 1937 *to the Indiana residents.* This conclusively demonstrates the impropriety of the admission of this exhibit into evidence as a foundation for the Master's findings and of the Court's approval of his findings. In one breath they claim that the distribution by Midamerica was made in the Spring of 1937 and that they were appointed in 1938, and in another breath they urge (p. 40) that they were appointed as Trustees of the Van Sweringen Corporation on February 9, 1937. If their position was not adverse, and if they *knew* of the existence of the cause of action from the newspaper clippings, *they would have taken action in the Spring of* 1937 *to prevent the distribution.* Because of the distribution of the funds to non-residents, it was necessary to commence a suit in a *foreign* jurisdiction, and the matter was compromised for $550,000. Perhaps if the distribution was prevented, $5,000,000 *would have been recovered,* as was the case in a suit commenced by another creditor, which case is now pending on Certiorari before this Court (*Ball* v. *Cook,* No. 426).

For the foregoing reasons we submit that the writ should be allowed.

Respectfully submitted,

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